No. 88-651

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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RICHARD ANDERSON PHOTOGRAPHY,
Petitioner,

v.

RADFORD UNIVERSITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Copyright Act of 1976, 17 U.S.C. §§ 101-800, reflect the requisite unmistakable Congressional intent to abrogate the interests of state sovereignty guaranteed by the Eleventh Amendment to the United States Constitution?

LIST OF PARTIES

The petitioner in this Court and the appellant below: Richard Anderson Photography. The respondents in this Court, and appellees below: Radford University and the Board of Visitors of Radford University. Other appellees below, not respondents in this Court: Deborah Brown, Director of Public Information and Relations, Radford University; and Bernice Thieblot and Armand Thieblot, owners of North Charles Street Design Organization.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Radford University ("Radford") is a state institution of higher education in Virginia. Virginia Code §§ 23-155.1 through 23-155.10. In 1981, Radford entered into an oral agreement with North Charles Street Design Organization ("NCSDO") to produce certain publications to be used in recruiting students (hereinafter referred to collectively as "recruiting materials"). NCSDO in turn entered into a contract with Richard Anderson Photography ("Anderson") to provide the photographs to be used in the recruiting materials. In October 1981, NCSDO informed Radford, in writing, that all photographic slides prepared by Anderson would be the property of Radford,

and that the negatives would remain the property of Anderson.

Anderson prepared a large number of photographic slides, the vast majority of which were used in connection with the recruiting materials. Some (perhaps as few as one) were used in an athletic promotion brochure. Anderson contested, as unauthorized, this use of the slide or slides.

In April 1985, Anderson filed suit for copyright infringement against Radford, its governing board, and its public information officer Deborah Brown in the United States District Court for the Western District of Virginia. All of Anderson's photographic slides bore a copyright notice, but none were registered at the time of any of the uses made of them by Radford. In May 1985, Radford returned to Anderson all of the photographic slides. Anderson has continued to seek damages for the alleged unauthorized use of the slides.

On April 23, 1986, the district court dismissed Radford, its governing board and Brown in her official capacity on grounds of Eleventh Amendment immunity. (633 F. Supp. 1154.) Anderson appealed to the United States Court of Appeals for the Fourth Circuit.

On July 20, 1988, the Fourth Circuit affirmed the district court's dismissal, holding that Congress had not expressed unequivocally in the statutory language of the Copyright Act the requisite intent to abrogate the states' Eleventh Amendment immunity. (852 F.2d 114.) Nor, the Fourth Circuit held, had Virginia or its institutions constructively waived Eleventh Amendment immunities for purposes of alleged copyright infringement. The Fourth Circuit remanded for further action the district court's dismissal of Deborah Brown in her individual capacity, holding that a state employee was not immune under the Eleventh Amendment for alleged copyright infringement. 852 F.2d at 122-23.

REASONS FOR DENYING THE WRIT

For the reasons which follow, the respondents respectfully submit that this Court should decline the invitation to review the Fourt Circuit's opinion. Rule 17 of the Rules of the United States Supreme Court provides that a writ of certiorari will be granted "only when there are special and important reasons therefor." Of the specific types of such special and important reasons set forth in the rule, only one is at all germane to this case. That criterion, set forth in 17.1.(c), militates in favor of granting a writ when "a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court[.] . . ."

While the specific question that Anderson seeks to have this Court address—*i.e.* the effect of the Eleventh Amendment *vis-à-vis* the Copyright Act—has not been decided by this Court, there is no conflict in the circuits on the issue. Both the Fourth Circuit decision Anderson seeks to have this Court review, and the recent decision of the Ninth Circuit in *B.V. Engineering v. University of California, Los Angeles*,[1] found no sufficient evidence of Congressional intent in the statutory language of the Copyright Act to abrogate the states' immunities.

Nor is the decision of the Fourth Circuit substantively flawed. This Court has clearly delineated the extent and nature of the Eleventh Amendment bar,[2] and lucidly described the scrutiny that must be focused on any federal statute when attempting to find Congressional intent to abrogate the immunity conferred by the amendment.[3]

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[1] 858 F.2d 1394 (9th Cir. 1988), overturning *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979).

[2] *See, e.g., Papasan v. Allain*, 478 U.S. 265 (1986); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

[3] *Welch v. State Dept. of Highways and Transportation*, 107 S. Ct. 2941 (1987); *Green v. Mansour*, 474 U.S. 64 (1985); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

The Fourth Circuit's decision in the instant case studiously resorted to, and correctly applied, that precedent.

Anderson also argues that this Court should accept this case on certiorari because the Fourth Circuit's opinion advances no legitimate purpose of the amendment. This argument is not well founded. The interest the amendment advances, which is no less inherent in the facts of this case because it concerns alleged copyright infringement, is the preservation of comity between state and federal governments. This is an interest manifestly as important as the availability of money damages to individuals who have been unable to cite any specific examples of abuse.

Because the Fourth Circuit opinion follows so precisely the clear guidance of this Court's Eleventh Amendment precedent, Anderson seeks to avoid the effect of the application of this law by invoking the doctrine of constructive waiver. In *Welch v. State Department of Highways and Public Transportation*, 107 S. Ct. 2941, 2947-48 (1987), this Court clearly announced the death of that doctrine, if it still had viability, by stating that to the extent *Parden v. Terminal Railway*, 377 U.S. 184 (1964), was inconsistent with *Welch*, *Parden* was overruled. Thus, constructive waiver is simply a dead legal theory. As such it cannot form the basis for the exception Anderson seeks.

Granting a writ of certiorari under these circumstances—where there is no conflict of lower courts to resolve, or flawed application of this Court's precedent in the specific case of which review is sought—implies the necessity for this Court to rule on each and every federal enactment in which an Eleventh Amendment defense is raised. This Court should reject such an expansive reading of its responsibilities, and continue to defer to the circuits to apply its clear jurisprudence, as the Fourth Circuit has done in this case.

Because there is no conflict in the circuits, and no conflict between the Fourth Circuit's opinion and this Court's precedent, Anderson attempts to make much of the alleged importance of the question presented in this case by noting that jurisdiction under the Copyright Act is exclusively in the federal courts. Anderson argues that the Fourth Circuit's opinion effectively forecloses its ability to seek damages against Radford in any forum. This appeal to the equities of the situation is unwarranted for several reasons. First, while damages may not be available against Radford under the Copyright Act, they are available against its agents acting in their individual capacities, and the Fourth Circuit so found. *See* 852 F.2d at 122-23. Second, the unavailability of damages under the Copyright Act does not leave Anderson without remedy.

The laws and Constitution of the Commonwealth of Virginia give clear remedies outside the context of the Copyright Act. The Virginia Constitution states, in Article I, § 11, that "no person shall be deprived of . . . property without due process of law," nor shall the General Assembly pass "any law whereby private property shall be taken or damaged for public uses, without just compensation[.]" This section of the Virginia Constitution is self-executing and authorizes a common law action to recover damages for property taken or damaged by the Commonwealth. *Burns v. Board of Supervisors of Fairfax County*, 218 Va. 625, 627, 238 S.E.2d 823, 825 (1977); *Swift & Co. v. Newport News*, 105 Va. 108, 114-15, 52 S.E. 821, 824 (1906).

In addition to the self-executing constitutional provision referred to above, the Code of Virginia broadly provides a mechanism for the presentation of any "pecuniary claim against the Commonwealth upon any legal ground" to the head of the state entity giving rise to the claim or, if that cannot be determined, the state Comptroller. *See* Virginia Code § 2.1-223.1. If the claim is disallowed,

Virginia Code § 8.01-192 provides "the person presenting such claim may petition an appropriate circuit court for redress." *See also, Stuart v. Smith-Courtney Co.*, 123 Va. 231, 96 S.E. 241 (1918). Moreover, tort claims against the Commonwealth may be brought pursuant to the Virginia Tort Claims Act, Virginia Code §§ 8.01-195.1 through 8.01-195.8. Property which is tortiously taken by government is always compensable under state law.[4]

The issue of the quality of the available remedies is a red herring. Eleventh Amendment jurisprudence does not turn on what the law should be. The Eleventh Amendment requires that Congress unequivocally express its intention where state interests are concerned. If that intention is not unmistakably apparent, the federal law is not applicable to the states. As this Court has emphasized, the states have vital interests that are at stake

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[4] Every state in the Union provides, by constitution or statute, a remedy for unlawful taking of private property by the government. *See, e.g.*, Ind. Const. Art. 1, §§ 12, 21 (Burns 1978); Ky. Const. §§ 13, 231 (Michie/Bobbs-Merrill 1988); La. Const. Art. 1, § 2 (West 1977); Md. Const. §§ 19, 24 (1981); Mass. Const. §§ 19, 24 (West 1981); Mich. Const. Art. 1, § 17; Minn. Const. Art. 1, § 7 (West 1976); N.J. Const. Art. 1, ¶ 1 (West 1971); N.J. Const. Art. 4, § 6, ¶ 3 (West 1971); N.J. Const. Art. 1, § 6 (McKinney 1982); N.C. Const. Art. I, § 19 (1984); Pa. Const. Art. 1, §§ 2, 9, 11 (Purdon 1969); Tex. Const. Art. 1 §§ 17, 19 (Vernon 1984); Ind. Code Ann. §§ 34-4-16.1–34-4-16.7 (Burns Supp. 1988); Ky. Rev. Stat. Ann. §§ 44.070-44.160 (Michie/Bobbs-Merrill 1986); La. Rev. Stat. Ann. § 13:5101 *et seq.* (West Supp. 1988); La. Rev. Stat. Ann. § 49:111 *et seq.* (West 1987); Md. State Gov't Code Ann. §§ 12-101–12-204 (Supp. 1988); Mass. Gen. Laws Ann. ch. 258, § 1 *et seq.* (West 1988); Mass. Gen. Laws Ann. ch. 260, § 3A (West 1959); Mich. Comp. Laws Ann. § 21.12 (West 1981); Mich. Comp. Laws Ann. § 691.1401 *et seq.* (West 1987); N.J. Stat. Ann. §§ 52:4A-1, 52:17B-4.1, 52:17B-4.2 (West 1986); N.J. Stat. Ann. §§ 59:1-1 *et seq.* 59:11-1 (West 1982); N.Y. Jud. Law §§ 8-27 (McKinney Supp. 1988); N.C. Gen. Stat. § 143-291 *et seq.* (1987); 42 Pa. Cons. Stat. Ann. §§ 761, 4651-1 *et seq.*, 8521 *et seq.*, (Purdon Supp. 1988); Tex. Rev. Civ. Stat. Ann. § 6252-19 *et seq.* (Vernon Supp. 1989).

protected by the Eleventh Amendment. In those instances in which it has the power to do so,[5] Congress may override these interests, but must clearly and unequivocally indicate such intention. In this context, the Ninth Circuit's statement in *B.V. Engineering v. University of California, Los Angeles*, 858 F.2d at 1400, that "[i]t is for Congress . . . to remedy this problem[,]" quoted with disfavor in footnote 8 of Anderson's brief, is absolutely correct and proper. If there is a "problem," it is one the legislative process should address.[6]

It is by no means clear, however, that there is a problem. Despite the numerous hypothetical tales of woe that have been paraded by the advocates of Anderson's position throughout this litigation, not one single *actual* instance of the type of abuse by the states that these advocates purport to fear has been cited. Because laws typically address actual needs, it is conceivable that Congress chose not to subject the states and their instrumentalities to the Copyright Act because there is no record of abuse to support such action. Clearly, where Congress perceives a need to make clear its intent, it can do so.

For the foregoing reasons, respondents respectfully submit that this Court should decline this invitation to

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[5] Although the district court addressed the issue of Congressional power to abrogate pursuant to the Patent and Copyright Clause, the Fourth Circuit did not reach that issue, and it is not necessary for this Court to do so to answer the question presented here.

[6] The legislative process is, in fact, currently reviewing the specific question this Court is being asked to decide: whether the states should be subject to federal suits for damages under the Copyright Act. The report of the Register of Copyrights, *Copyright Liability of States and the Eleventh Amendment* (June 1988), referred to at pp. 7, 8, 19 and 33 of Anderson's brief, was specifically prepared for members of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, of the Committee of the Judiciary, at their request, as part of this review.

forge new Eleventh Amendment jurisprudence and undertake a singularly legislative responsibility.

CONCLUSION

Because the Fourth Circuit's opinion correctly applies this Court's Eleventh Amendment jurisprudence and is not in conflict with any other circuit opinion, and further because the question presented centers on a public policy question which should be addressed by Congress, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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